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UK Government Publishes Draft Legislation for a New Foreign Direct Investment Regime

Investors should plan today for the UK's National Security and Investment Bill.

On 11 November 2020, the UK government published the draft of its long-awaited National Security and Investment Bill (the NSI Bill). The regime envisaged in the draft NSI Bill has many similarities to the Committee on Foreign Investment in the United States (CFIUS) regime and is designed to allow the UK government to intervene in investments considered to pose a risk to national security. The NSI Bill could come into force as early as Q1 2021 but will have retrospective review powers over certain investments still to complete. As such, investors currently contemplating any transaction with a UK nexus should consider the application of the regime.

Key features of the draft NSI Bill include:

- **A mandatory notification** requirement for investments relating to 17 (broadly) defined sectors of the economy considered to be most sensitive from a national security perspective (see below), with completion prevented until clearance has been received. Investors acquiring shareholdings (or equivalent voting rights) of or above 15%, or above 25%, 50%, and of 75% or more will be required to make notifications.
- **A voluntary notification** is possible for investments outside of those 17 sectors, otherwise the UK Secretary of State can **call in for review non-notified investments up to five years post-completion** (or six months if the UK government is “made aware” of the investment). The Secretary of State’s call-in power extends to: (i) acquisitions of shareholdings (or equivalent voting rights) of less than 15% if they constitute “material influence” (as well as to investments crossing the 15%, 25%, 50%, and 75% thresholds); and (ii) acquisitions of a “qualifying asset”, which includes land; tangible moveable property; and ideas, information, or techniques that have industrial, commercial, or other economic value.
- **No jurisdictional thresholds:** the Secretary of State’s ability to intervene in an investment is not limited by any turnover or asset value thresholds. There is no requirement for a target to have a UK subsidiary or assets for the regime to apply; the target simply needs to carry on relevant activities in the UK.

- **Retroactive application:** to deter parties from seeking to push through sensitive transactions prior to the NSI Bill coming into force, the Secretary of State will have the power to call in for review investments that completed after the publication of the draft NSI Bill (i.e., from 12 November 2020) if the investment would otherwise have fallen within scope of the mandatory or voluntary notification regimes. However, the NSI Bill will not have retrospective effect on investments that completed prior to 12 November 2020.
- **Review period:** the Secretary of State will have an initial review period of 30 working days, with an additional 30 working days for a more in-depth review, which is extendable by another 45 working days.
- **Criminal and civil sanctions** may be imposed for non-compliance, including fines of up to 5% of worldwide turnover or £10 million — whichever is the greater — and imprisonment of up to five years.

Next steps are for the draft NSI Bill to be approved by both houses of the UK Parliament. This means that precise timing for when the NSI Bill will come into force is uncertain. However, **investors should plan for it to come into force in early 2021**. This is particularly important because:

- Transactions involving targets in the 17 specified sectors that have not completed prior to the NSI Bill coming into force (even if already signed) could require mandatory notification and clearance before they can then complete.
- Transactions in any sector that have completed between 12 November 2020 and the NSI Bill coming into force could fall within scope of the Secretary of State's call-in power.

Examining the Draft NSI Bill

The draft NSI Bill foresees a comprehensive regime giving the UK government broad powers to intervene in investments in businesses with a UK nexus that it considers to pose a potential risk to national security. The Secretary of State for Business, Energy and Industrial Strategy (BEIS) will be the sole decision-maker under the new regime in a quasi-judicial role, with the ability to consult with other government departments prior to reaching a decision. The draft NSI Bill is not limited to transactions involving foreign investors, but the government [press release](#) accompanying the draft NSI Bill makes clear that it is targeted at “potentially hostile foreign direct investment”.

Mandatory regime

Mandatory notification will be required for the acquisition of shareholdings (or equivalent voting rights) of or above 15%, or above 25%, 50%, and of 75% or more (with new notifications required each time a threshold is crossed) in businesses active in the UK in 17 specified sectors of the economy. The draft NSI Bill does not define these sectors but is accompanied by a [Consultation Paper](#) that proposes draft definitions. The Consultation Paper envisages the mandatory regime applying to certain activities in the following 17 sectors considered to be most sensitive from a national security perspective: Advanced Materials, Advanced Robotics, Artificial Intelligence, Civil Nuclear, Communications, Computing Hardware, Critical Suppliers to Government, Critical Suppliers to the Emergency Services, Cryptographic Authentication, Data Infrastructure, Defence, Energy, Engineering Biology, Military and Dual Use, Quantum Technologies, Satellite and Space Technologies, and Transport. The consultation period will run until 6 January 2021.

Voluntary regime and the Secretary of State's post-completion call-in powers

The Secretary of State will have the ability to call in for review investments posing a potential national security risk, that fall outside the sectoral scope of the mandatory regime, for up to five years post-completion (or six months if the Secretary of State is made aware of the investment). In such circumstances, the Secretary of State will have powers to issue orders preventing the investment from completing or, in the case of completed investments, preventing further steps towards integration while the investment is being reviewed. The Secretary of State's call-in power applies to the acquisition of stakes of or above 15% or above 25%, 50%, and of 75% or more, but unlike under the mandatory regime, also to stakes below 15% if they constitute "material influence". Material influence is a broadly defined concept that already exists in the UK competition regime, and, as an example, may include transactions in which the investor has obtained no equity stake but has obtained a seat on the target's board.

In addition, the Secretary of State's call-in power extends to acquisitions of "qualifying assets", which are defined as land; tangible moveable property; and ideas, information, or techniques that have industrial, commercial, or other economic value. Examples cited in the draft NSI Bill of this latter category include trade secrets, databases, source code, algorithms, formulae, designs, plans / drawings / specifications, and software. To remove the risk of the post-closing call-in of investments falling outside the mandatory regime, investors will have the option to submit a voluntary notification to the Secretary of State.

Procedure

The Secretary of State will have an initial 30 working day period to review the investment. There is an additional review period of another 30 working days, which may be extended by a further 45 working days, if the Secretary of State reasonably believes that the investment poses a risk to national security. The Secretary of State will have extensive powers to request information, including internal documents. Non-compliance with the regime can result in the imposition of civil and/or criminal sanctions. A new team at the Department for BEIS will have responsibility for processing notifications. The [Statement of Policy Intent](#) accompanying the draft NSI Bill envisages that investors will be able to have informal confidential conversations with the Secretary of State's team to understand the application of the regime to their investments.

Outcomes

Similar to other foreign investment regimes around the world, the Secretary of State will have the power to clear or prohibit an investment, or clear an investment subject to conditions. Decisions by the Secretary of State may be appealed to the UK courts. Details of investments reviewed by the Secretary of State will be published only if the investment is prohibited or if clearance is subject to conditions.

Implications for Investors

The breadth of the draft NSI Bill indicates that the regime will impact a significant range of investments involving businesses with a UK nexus (note that there is no requirement for a target to have a UK subsidiary or assets for the regime to apply). Acquisitions of minority stakes and of assets are firmly within scope, and while the mandatory notification requirement is limited to certain sectors of the economy, these are still numerous and broadly defined. Furthermore, parties investing in any sector falling outside the mandatory regime will have to weigh the burden of a voluntary notification against the risk of a post-closing call-in if they choose not to notify the Secretary of State. While the regime is targeted at the small number of investments that could harm national security, it will have an impact on significantly more investments. The Department for BEIS estimates that c. 1,000 to 1,830 transactions could be subject to mandatory notification each year and a further 70 to 95 transactions could be called in for review.

The publication of the draft NSI Bill has coincided with the UK government's announcement in the same week of plans to establish an Office for Investment. The Office will be based in the Department for International Trade and is designed to attract foreign investment in strategic projects. These two initiatives signal that the UK government has recognised the need to balance a desire for greater intervention in the economy on national security grounds with the post-Brexit imperative of finding new ways to attract foreign investment.

In view of the draft NSI Bill potentially coming into force as early as Q1 2021, parties currently contemplating transactions involving a target business with a UK nexus would be advised to carefully consider the application of the new regime to their transaction.

Quickly access key aspects of CFIUS and other foreign direct investment regimes around the world by downloading the [Latham & Watkins Foreign Direct Investment Regimes App](#). Watch [this video](#) to learn about what you can expect from the app.

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